Supreme Court, U. S.
FILED
APR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR PETITIONERS

MIKE BARKLEY
Attorney for Petitioner World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh
40 Wall Street
New York, New York 10005

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Constitutional Provision and Statute Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	5
ARGUMENT:	
The Exercise of *In Personam* Jurisdiction by an Oklahoma Court over a Local New York Retailer and his New York Regional Distributor, Based Solely on Injury in Oklahoma as a Result of the Transient Presence in that State of the Retailer's New York Customer and the Product He Purchased in New York, Violates the Due Process Clause of the Fourteenth Amendment	6
A. Oklahoma Has No Basis for Jurisdiction, Since Petitioners Did Not Avail Themselves of the Privilege of Conducting Activities in Oklahoma	6
B. Jurisdiction Cannot Be Constitutionally Sustained Solely on the Basis of the Foreseeability of a Possibility that a Purchaser Might Fortuitously Travel through Oklahoma and Might Be Involved in an Accident	8
C. Previous State and Lower Federal Court Decisions Articulate the Inherent Impropriety in Requiring a Seller To Defend in a Forum Where He Does Not Market His Wares or Engage in Other Economic Activity	9
D. Contrary To This Court's Holding in *Hanson*, Which Was Reaffirmed in *Shaffer* and *Kulko*, the Decision of the Oklahoma Supreme Court Shatters All Restrictions on the Personal Jurisdiction of State Courts over Localized Out of State Sellers	11
CONCLUSION	12

Table of Cases Cited

	PAGE
Easterling v. *Cooper Motors, Inc.* 26 F.R.D. 1 (M.D.N.C. 1960)	10
Erlanger Mills v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956)	11
Granite States Volkswagen, Inc. v. *District Court*, 177 Colo. 42, 492 P.2d 624 (1972)	10
Hanson v. *Denckla*, 357 U.S. 235 (1958)	6, 7, 8, 11
Hapner v. *Rolf Brauchli, Inc.*, 404 Mich. 160, 273 N.W. 2d 822 (1978)	7
Hutson v. *Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978)	7
In-Flight Devices Corp. v. *Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972)	7
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)	6
Jack Pickard Dodge, Inc. v. *Yarbrough*, 352 So.2d 130 (Fla. Dist. Ct. App. 1977)	10
Kerrigan v. *Clarke Gravely Corp.*, 71 F.R.D. 480 (M.D. Pa. 1975)	10
Kulko v. *Superior Court*, 436 U.S. 84 (1978)	6, 7, 8, 11
Lisoni v. *Dave Cole Pontiac, Inc.*, 52 Cal. App. 3d 445, 125 Cal. Rptr. 120 (1975)	10
O'Brien v. *Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963)	7
Oliver v. *American Motors Corp.*, 70 Wash. 2d 875, 425 P.2d 647 (1967)	9
Pellegrini v. *Sachs & Sons*, 522 P.2d 704 (Utah 1974)	9
Shaffer v. *Heitner*, 433 U.S. 186 (1977)	7, 11
Tilley v. *Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968)	10
Uppgren v. *Executive Aviation Services, Inc.*, 304 F.Supp. 165 (D. Minn. 1969)	12

Constitutional Provision and Statutes Cited

	PAGE
Oklahoma Statutes, title 12, section 1701.03(a) (4)	2
United States Constitution, Fourteenth Amendment, section 1	2
28 U.S.C., section 1257 (3)	2

Other Authorities Cited

Comment, *Tortious Act As a Basis for Jurisdiction in Products Liability Cases*, 33 Fordham L. Rev. 671 (1965)	11
Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533	11
Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61 (1965)	11
Note, *Recent Developments—Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute*, 66 Colum. L. Rev. 199 (1966)	11
Note, *Developments in the Law, State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960)	11
Note, *A Reconsideration of "Long Arm" Jurisdiction*, 37 Indiana L.J. 334 (1962)	7
Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 Cornell L.Q. 196 (1957)	6
Twerski, *A Return to Jurisdictional Due Process—The Case for the Vanishing Defendant*, 8 Duquesne L. Rev. 220 (1970)	7

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and
SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Oklahoma Supreme Court, not yet reported, appears in the Appendix (1a-6a) to the petition for a writ of certiorari.* No opinion was rendered by the lower court, the District Court of Creek County, Oklahoma.

---

* Abbreviated hereinafter as "Cert. Pet. App." Citations to pages of the Appendix filed with this Court pursuant to Rule 36 are preceded by the letter "A."

Jurisdiction

On October 10, 1978, the Oklahoma Supreme Court denied petitioners' application for a writ of prohibition and held that the State of Oklahoma may exercise *in personam* jurisdiction over petitioners in this case. The petition for a writ of certiorari was filed on January 5, 1979 and the writ was granted on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision and Statute Involved

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution and the Oklahoma "long arm" statute.

Section 1 of the Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> "No State shall * * * deprive any person of life, liberty or property, without due process of law * * *."

The Oklahoma Statutes, tit. 12, §1701.03, in pertinent part, provides:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:
>
> * * *
>
> (4) causing tortious injury in this state by an act or omission outside this state if he * * * derives substantial revenue from goods used or consumed or services rendered, in this state."

Question Presented

Whether the exercise by the State of Oklahoma of personal jurisdiction over a New York retailer and his New York wholesale supplier is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution where (1) it is based solely on injury in Oklahoma resulting from the fortuitous transient presence in that state of the retailer's New York customer and the product he purchased in New York and (2) the retailer and the wholesaler neither engaged in any business, economic or other activity in, or directed toward, Oklahoma or Oklahoma residents, nor had any other relationship with Oklahoma or Oklahoma residents.

Statement of the Case

On December 15, 1976, Harry Robinson, a New York resident, purchased an Audi automobile from Seaway Volkswagen, Inc. ("Seaway"), a local Audi dealer in Massena, New York. In September 1977, Mr. Robinson and his wife and children were travelling through Oklahoma, on their way to Arizona, when the Audi automobile, which was being driven by Mrs. Robinson, collided with another vehicle. The Robinsons initiated a suit in Oklahoma alleging manufacturing and design defects in the Audi vehicle, suing both Audi N.S.U. Auto Union Aktiengesellschaft, the German manufacturer of the car, and Volkswagen of America, Inc., the importer of the vehicle. Also named in the suit were Seaway and Seaway's supplier, World-Wide Volkswagen Corporation ("World-Wide"), a New York wholesale distributor which sells Audi and other vehicles to local dealers in New York, New Jersey and Connecticut (A. 22).

Neither Seaway nor World-Wide has ever done any business in Oklahoma and neither has ever derived any revenue from economic activities related to Oklahoma. The business activities of Seaway and World-Wide are, by their very nature, confined to their local areas. They do not advertise their products in any national magazine or on any television or radio network and they do not participate in any advertising fund or pool placing advertisements in or which reach Oklahoma (A. 16, 18-19). Oklahoma is simply outside the economic sphere in which Seaway and World-Wide operate.

Completely lacking contacts with Oklahoma, Seaway and World-Wide moved to dismiss the Robinsons' action on the ground that the assumption of jurisdiction over them by the State of Oklahoma would violate the Due Process Clause of the Fourteenth Amendment. Following a denial of their motion by the Oklahoma District Court, Seaway and World-Wide petitioned to restrain the district court judge, the Hon. Charles S. Woodson, from exercising jurisdiction, again contending that the Due Process Clause precluded Oklahoma from subjecting them to its jurisdiction (A. 29, 32).

On October 10, 1978, the Oklahoma Supreme Court denied the writ of prohibition, concluding that personal jurisdiction over petitioners could be exercised under the Oklahoma "long arm" statute, because each of the petitioners "derives substantial revenue from goods used * * * in this State." Okla. Stat., tit. 12, § 1701.03(a)(4). From the use by the Robinsons of the car in Oklahoma, the court believed it was "reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma" (Cert. Pet. App. 6a).

The Oklahoma Supreme Court acknowledged that a determination of long-arm jurisdiction necessitates an inquiry into "whether such exercise of jurisdiction is consistent with the constitutional requirements of due process" (Cert. Pet. App. 2a), as well as an analysis of state statutory provisions. Yet the court never specifically commented on its conclusions with respect to this threshold inquiry. Presumably, the court decided that the constitutional requirements were satisfied by the fact that "the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma" (Cert. Pet. App. 6a).

Summary of Argument

Oklahoma is not a permissible forum for the litigation between the Robinsons and petitioners. The presence of the accident vehicle in Oklahoma stemmed from the voluntary and unilateral post-sale decision by the Robinsons to travel through that state. Neither Seaway, the Massena, New York retailer from whom Mr. Robinson purchased the car, nor World-Wide, the regional wholesaler who supplied the vehicle to Seaway, competes for sales in the Oklahoma marketplace. Nor do Seaway and World-Wide have any other contacts with the State of Oklahoma. In the absence of any purposeful economic efforts or commercial activity directed toward Oklahoma or its residents by petitioners, mere foreseeability that a vehicle, sold in New York to a New Yorker, may one day enter Oklahoma is not constitutionally sufficient to justify the exercise of *in personam* jurisdiction over petitioners by the State of Oklahoma.

ARGUMENT

The Exercise of *In Personam* Jurisdiction by an Oklahoma Court over a Local New York Retailer and his New York Regional Distributor, Based Solely on Injury in Oklahoma as a Result of the Transient Presence in that State of the Retailer's New York Customer and the Product He Purchased in New York, Violates the Due Process Clause of the Fourteenth Amendment.

A. Oklahoma Has No Basis for Jurisdiction, Since Petitioners Did Not Avail Themselves of the Privilege of Conducting Activities in Oklahoma.

Before a person can become subject to *in personam* jurisdiction, he must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958); *Kulko* v. *Superior Court*, 436 U.S. 84, 94 (1978).

This essential element is completely absent in this case.

Where, as here, the localized seller's marketing area is distant and distinct from the forum state, and that state is not the focus or target of any purposeful acts by the seller, it becomes unfair and unreasonable, in the context of our federal system of government, for the seller to be called upon to defend in the forum state. *See*, Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 Cornell L.Q. 196 (1957); Twerski, *A Return to Jurisdictional Due Process—The Case for the Vanishing Defendant*, 8 Duquesne L. Rev. 220 (1970); Note, *A Reconsideration of "Long-Arm" Jurisdiction*, 37 Indiana L.J. 334 (1962). Even in the case of a manufacturer, if the introduction of the product into the forum state is not attributable to the calculated efforts of the manufacturer to exploit the forum market, the manufacturer cannot be deemed to have invoked the benefits of the laws of the forum state. *Hutson* v. *Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978); *Hapner* v. *Rolf Brauchli, Inc.*, 404 Mich. 160, 273 N.W.2d 822 (1978); *O'Brien* v. *Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963).

In this case there is not even the remotest activity directed to the exploitation of a market in the forum state, and no economic gain by reason of any purposeful activity in that state. The only contact among the parties, the forum and the litigation resulted entirely from the Robinsons' decision to pass through that state. To require Seaway and World-Wide to defend in Oklahoma in the absence of any activities by them is necessarily unfair and unreasonable. *Kulko* v. *Superior Court, supra*, 436 U.S. at 93-94; *Shaffer* v. *Heitner*, 433 U.S. 186, 204, 215-216 (1977); *Hanson* v. *Denckla, supra*, 357 U.S. at 253; *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220, 226, 228 (6th Cir. 1972).

B. Jurisdiction Cannot Be Constitutionally Sustained Solely on the Basis of the Foreseeability of a Possibility that a Purchaser Might Fortuitously Travel Through Oklahoma and Might Be Involved in an Accident.

The finding of the Oklahoma Supreme Court that an Oklahoma accident was a foreseeable consequence of the sale by the Massena retailer to a local resident is a constitutionally impermissible basis for assuming jurisdiction over petitioners. Foreseeability, without more, is not constitutionally equivalent to the test of *International Shoe.*

That a New York purchaser of an automobile from a New York dealer may, one day, travel in that car to another state, cannot of course be excluded from the realm of possible foreseeability. Indeed, it is foreseeable that any purchaser of any consumer product may choose to take that product out of the state of purchase. If foreseeability alone were sufficient, every local seller would be subject to suit in every state in which the product he sold happens to be brought by the purchaser.

Foreseeability must be coupled with the requisite "affiliating circumstances" before it is reasonable and fair for a state to subject a person to its jurisdiction. *Hanson* v. *Denckla, supra,* 357 U.S. at 246; *Kulko* v. *Superior Court, supra,* 436 U.S. at 92. These affiliating circumstances are not present where the seller does not purposefully avail himself of the benefits of the forum state, either through sales in that state-or through intentional efforts to reach that state's market and thereby generate revenue from sales to residents of that state.

C. Previous State and Lower Federal Court Decisions Articulate the Inherent Impropriety in Requiring a Seller To Defend in a Forum Where He Does Not Market His Wares or Engage in Other Economic Activity.

In *Oliver* v. *American Motors Corp.,* 70 Wash.2d 875, 425 P.2d 647 (1967), the plaintiff, a resident of Oregon, purchased a vehicle from an Oregon dealer. He subsequently went on a trip to the State of Washington, where he was overcome by gaseous fumes emanating from the car's exhaust system. The Supreme Court of Washington held that the exercise of long-arm jurisdiction was unconstitutional.

> "To attach personal jurisdiction because * * * the out-of-state purchaser brings the offending mechanism into this state and a tortious consequence occurs is so slender and tenuous a thread upon which to hang the implication of submission to our jurisdiction, that in our judgment it does indeed offend 'traditional notions of fair play and substantial justice' within the contemplation of the due process clause." 70 Wash.2d at 889, 425 P.2d at 656.

In *Pellegrini* v. *Sachs & Sons,* 522 P.2d 704 (Utah 1974), the plaintiff, a California resident, after purchasing an automobile from a local California dealer, moved to Utah, where he was involved in a collision. The exercise of long-arm jurisdiction over the California dealer was held unconstitutional.

> "While it is true that [a dealer] may reasonably expect that the car will go into other states, that does not seem overly important. The counterpoint is that it is also to be expected that most of the products he sells will be used where he is (in California) most of the time; and that even if one does

leave, it will likely return, so that in the great preponderance of instances, the discharge of his duties as to the product will be where he is. It is more significant to note that he does not go into the foreign state to take advantage of its business climate or the protection of its laws." 522 P.2d at 707.

Again in *Tilley* v. *Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968), the court refused, on constitutional grounds, to permit jurisdiction over an out of state truck dealer who sold the vehicle in Colorado to a Colorado resident.

> "[T]here must be something more in 'product hazard' cases than a foreseeable injury from the product to fulfill the minimum contact requirement of due process." 200 Kan. at 648, 438 P.2d at 133.

Similarly, the Supreme Court of Colorado, in *Granite States Volkswagen, Inc.* v. *District Court*, 177 Colo. 42, 492 P.2d 624 (1972), refused to exercise long-arm jurisdiction over a New Hampshire dealer who sold a car in New Hampshire to a person who subsequently moved to and had an accident in Colorado. Without a showing of any "voluntary action calculated to have an effect" in Colorado, there was no constitutional basis for *in personam* jurisdiction over the dealer in Colorado. 177 Colo. at 45, 492 P.2d at 625-626. *See also, Kerrigan* v. *Clarke Gravely Corp.*, 71 F.R.D. 480 (M.D. Pa. 1975); *Easterling* v. *Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960); *Jack Pickard Dodge, Inc.* v. *Yarbrough*, 352 So.2d 130 (Fla. Dist. Ct. App. 1977); *Lisoni* v. *Dave Cole Pontiac, Inc.*, 52 Cal. App. 3d 445, 125 Cal. Rptr. 120 (1975).

D. Contrary To This Court's Holding in *Hanson*, Which Was Reaffirmed in *Shaffer and Kulko*, the Decision of the Oklahoma Supreme Court Shatters All Restrictions on the Personal Jurisdiction of State Courts Over Localized Out of State Sellers.

Hanson emphasized the fundamental restrictions on state courts in assuming *in personam* jurisdiction over litigants. These restrictions are "more than a guarantee of immunity from inconvenient or distant litigation." 357 U.S. at 251. As this Court stated: "They are a consequence of territorial limitations on the power of the respective States." *Ibid.*

The disregard by the Oklahoma Supreme Court of this admonition, which was reaffirmed in *Shaffer* v. *Heitner, supra*, 422 U.S. at 203-204 n.20, 216, and *Kulko* v. *Superior Court, supra*, 436 U.S. at 101, requires reversal of the decision below.

Under the rubric of the Oklahoma Supreme Court, every automobile dealer, every retail seller of tires* and, indeed, every retailer or local distributor of consumer products of

---

* The burdens imposed upon a local tire retailer, who would be amenable to suit in any state where his customer happened to be involved in an accident attributable to the tire, is the subject of Judge Sobeloff's often cited hypothetical in *Erlanger Mills* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956).

The constitutional issues raised by Judge Sobeloff's hypothetical are the subject of extensive academic commentary. *See*, Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 556, 559; Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61, 75, 82 (1965); Note, *Recent Developments—Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute*, 66 Colum. L. Rev. 199, 206-208 (1966); Note, *Developments in the Law, State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 929-930 (1960); Comment, *Tortious Act As a Basis for Jurisdiction in Products Liability Cases*, 33 Fordham L. Rev. 671, 702-705 (1965).

every nature would be required to defend a suit wherever the products he sells may become involved in an accident.* This would be so despite the complete lack of contact with the forum state and the total absence of any economic benefit from purposeful activity directed toward the forum state.

The assertion of Oklahoma's judicial jurisdiction over petitioners does not comport with due process of law simply because Seaway and World-Wide have nothing to do with the State of Oklahoma.

CONCLUSION

For all the reasons set forth, petitioners' request that this Court reverse the Oklahoma Supreme Court's denial of a writ of prohibition and direct that the writ be issued, prohibiting the respondent trial judge from exercising personal jurisdiction over petitioners.

Respectfully submitted,

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen
Corporation

DAN A. ROGERS
Attorneys for Petitioner
Seaway Volkswagen, Inc.

Of Counsel:
HALL, ESTILL, HARDWICK,
GABLE, COLLINGSWORTH
& NELSON
ROGERS, ROGERS & JONES
HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh

---

* *See, Uppgren* v. *Executive Aviation Services, Inc.*, 304 F.Supp. 165, 170-171 (D.Minn. 1969), where the court postulates the possible requirement of a roadside seller of soft drinks in Florida defending a suit in Alaska simply because the Alaskan purchaser bought the bottle in Florida, returned to his home state and gave it to his child, who drank its contents and became ill. Here, where the purchaser was not even a resident of the forum state, the inequity of such a result is even greater.